

IN RE INTEREST OF BECKA P.

Caselaw No.

Nos. A-18-884 through A-18-887

Filed on

Tuesday, August 6, 2019

Summary:

In this case the parents (Bob and Veronica) appeal from the Garden County Court sitting as a juvenile court's decision terminating their parental rights from four children.

In December 2015, separate petitions were filed to adjudicate Becka, Robert, and Thomas pursuant to Neb. Rev. Stat. § 43-247(3)(a) (Supp. 2015) based on the actions of both parents. Three of the children were adjudicated in February 2016 and a fourth child, Brandy, was adjudicated April 2017. The basis of the adjudication was the parents' failure to use proper car seats on a regular basis. The petition also included concerns in regard to the children's being developmentally delayed. All of the children were removed from the parental home on December 16, 2016; they have remained out of the home since that time. On July 31, 2018, the State filed a motion for termination of Bob's and Veronica's parental rights in regard to the four children, alleging statutory grounds to terminate existed pursuant to Neb. Rev. Stat. § 43-292(2), (3), (5), (6), and (7) (Reissue 2016), and alleging that termination was in the best interests of the children.

Several caseworkers testified to the fact that Bob was difficult to work with, yelled at them and in some cases threatened several workers to the extent protection orders were obtained. The various caseworkers also testified that Bob had made little to no changes in order to get his children back in his care. Testimony was also heard from mental health workers involved with the family. Again Bob's aggressiveness was brought up and his lack of measureable progress. With regards to Veronica, both the caseworkers and mental health professionals stated that while Veronica tried hard to make the suggested changes her own developmental delays made it difficult to impossible for her to take care of all five children (the youngest child is not part of this appeal). To wit Veronica herself admitted on the stand during the trial that she could not handle all the children at once. It was also pointed out that Veronica's limitations were such that there was serious concern that she would either allow Bob back in her life or some other unsuitable person.

Following trial, the court found that the state had presented clear and convincing evidence to satisfy §43-292(2), (3), (5), (6), and (7) and statutory grounds to terminate Bob's and Veronica's parental rights existed pursuant to § 43-292(2), (3), (5), (6), and (7) and that termination was in the children's best interests.

Bob appealed stating the trial court erred in admitting a particular exhibit into evidence during the trial because it violated his due process rights and his right to cross-examine witnesses. Veronica also appealed on grounds that the State did not present clear and convincing evidence to terminate nor did the State prove she was unfit. Both parents also appealed the finding that termination was in the best interest of the children.

The Court of Appeal's analysis laid out that the exhibit Bob objected to was a compilation of

notes and reports written by OFP family support workers who supervised visitations and observed the family. The exhibit was accepted into evidence under the business records exception to the hearsay rule. See Neb. Rev. Stat. § 27-803(5)(a) (Reissue 2016). And the exhibit was admitted during the testimony of Walter, a co-owner of OFP, who testified that she oversees OFP's programs, reviews the reports submitted by the workers, files all documentation, and is the record keeper of the company. Walters also testified to the fact that the records are kept in the ordinary course of business.

The Court of Appeals noted that the Nebraska Evidence Rules do not apply in cases involving the termination of parental rights. In *re Interest of Destiny A. et al.*, 274 Neb. 713, 742 N.W.2d 758 (2007). Instead, due process controls and requires that the State use fundamentally fair procedures before a court terminates parental rights. *Id.* In determining whether admission or exclusion of particular evidence would violate fundamental due process, the Nebraska Evidence Rules serve as a guidepost. In *re Interest of Destiny A. et al.*, *supra*. The Court also stated that rather than the formal rules of evidence, they evaluate the admission of evidence in termination of parental rights cases using a due process analysis. In *re Interest of Rebecka P.*, 266 Neb. 869, 669 N.W.2d 658 (2003). Procedural due process includes notice to the person whose right is affected by the proceeding; reasonable opportunity to refute or defend against the charge or accusation; reasonable opportunity to confront and cross-examine adverse witnesses and present evidence on the charge or accusation; representation by counsel, when such representation is required by the Constitution or statutes; and a hearing before an impartial decision maker. In *re Interest of Rebecka P.*, *supra*. In the instant case, the record reflects that both Bob and Veronica received proper notice of the termination hearing and that during the termination hearing, both were represented by their respective counsel. Bob and Veronica were given a reasonable opportunity to refute or defend against the grounds alleged for termination of their parental rights and had a reasonable opportunity to confront and cross-examine adverse witnesses and present evidence in regard to the termination.

Though Bob did not challenge the juvenile's court finding that statutory grounds to terminate had been met Veronica's appeal did. Therefore the Court of Appeals addressed this requirement for termination of parental rights.

Section 43-292(7) allows for termination when the juvenile has been in an out-of-home placement for 15 or more months of the most recent 22 months. It operates mechanically and, unlike the other subsections of the statute, does not require the State to adduce evidence of any specific fault on the part of a parent. In *re Interest of Kenna S.*, *supra*. In a case of termination of parental rights based on § 43-292(7), the protection afforded the rights of the parent comes in the best interests step of the analysis. *Id.* In the instant case it is undisputed that the children have been in out-of home placement for 15 or more months of the most recent 22 months.

Both Bob and Veronica also appealed that it was in the basis of best interest of the children to terminate their respective parental rights. It was clear from all the testimony that neither parent had progressed to the extent necessary to put themselves into a position to parent the children. Where a parent is unable or unwilling to rehabilitate himself or herself within a reasonable time, the best interests of the child require termination of the parental rights. In re Interest of Zanaya W. et al., 291 Neb. 20, 863 N.W.2d 803 (2015). Further, Nebraska courts have recognized that children cannot, and should not, be suspended in foster care or be made to await uncertain parental maturity. In re Interest of Octavio B. et al., 290 Neb. 589, 861 N.W.2d 415 (2015).

The Court of Appeals concluded that the juvenile court did not err in admitting exhibit 361 into evidence as to Bob's appeal and also concluded that the State proved by clear and convincing evidence that grounds for termination of Bob's and Veronica's parental rights existed under § 43-292(7) and that termination of their parental rights was in the children's best interests.

The Court of Appeals also noted that Veronica failed to comply with the rules regarding cross-appeals. See Neb. Ct. R. App. P. § 2-109(D)(4) (rev. 2014). See the opinion for that analysis.
